

FAYDREX, INC.

IBLA 73-408

Decided January 21, 1974

Appeal from decision of Oregon State Office, Bureau of Land Management, rejecting an application for amendment of a homestead entry, Roseburg 020623.

Affirmed.

Administrative Procedure: Burden of Proof

An applicant asserting a claim to receive the benefits of an act of Congress has the burden of presenting sufficient evidence of his entitlement to such benefits.

Applications and Entries: Amendments--Patents of Public Lands: Amendments

An application for the amendment of a patent is properly rejected where the record contains no evidence to show that the entryman entered lands not intended by him as his entry, and where the record fails to show what precaution to avoid error was taken by the entryman at the time of making the original entry, if in fact he intended to enter other lands.

APPEARANCES: Stuart E. Foster, Esq., Fronmayer & Deatherage, Medford, Oregon, for appellant.

OPINION BY MR. FISHMAN

Appellant corporation has appealed the April 24, 1973, decision of the Oregon State Office, Bureau of Land Management, which rejected its application for amendment of a homestead entry. The original

homestead entry, Roseburg 020623, was made January 19, 1933, and was patented March 26, 1937, by Patent No. 1089155, to one Clarence M. Roundtree, the predecessor in interest of present appellant.

The land included in the patent is described as the NW 1/4 SE 1/4 and Lot 6, section 19, T. 38 S., R. 3 W., W.M., Jackson County, Oregon. 1/ In its application, appellant indicated that Roundtree originally intended to enter the W 1/2 NW 1/4 SE 1/4, the E 1/2 NE 1/4 SW 1/4, the E 1/2 of Government Lot 5, and the W 1/2 of Government Lot 6, in section 19, T. 38 S., R. 3 W., W.M. In effect, such an amendment would shift the legal description of the rectangular plot to the west by approximately 10 chains (660 feet). In support of its assertion of the nature and source of the error and to demonstrate its good faith, appellant stated:

There is a stone marker along the South line of Section 19 marked with 1/4 chiseled in the East face of the stone. It is the North 1/4 corner for Section 30 to the South. The South 1/4 corner for Section 19 is located 238 feet East of that stone and there are no markers to indicate its location. It is my belief that the original applicant, Mr. Clarence Roundtree, used this 1/4 marker as his Southwest corner. The clearing, fencing, and building locations indicate a definite error in location. 2/

The decision of the Oregon State Office indicated that the official cadastral survey plat of 1912 correctly indicated the relationship of the 1/4 corners on the line between section 19 (where the patented entry lies) and section 30. The survey plat, which was in effect and available when the original entry was made, indicated that the south quarter corner of section 19 is 4.00 chains (264 feet) east of the north quarter corner of section 30. The State Office found the entryman's error in location had not been shown to have resulted without his fault, and thus because the regulation, 43 CFR 1821.6-3(a), requires such a showing in good faith, the application for amendment was rejected. This regulation is based upon R.S. 2372, as amended, 43 U.S.C. § 697 (1970).

1/ Lot 6 appears to be the equivalent of the SW 1/4 SE 1/4, T. 38 S., R. 3 W., W.M., thereby making the entry the equivalent of the W 1/2 of the SE 1/4.

2/ The statement regarding "my belief" is indicated as being made by Roger Weiss, Vice President, Faydrex, Inc. We also note that 238 feet is not equivalent to 660 feet.

The regulation states:

The application must contain a full statement of all the facts and circumstances, showing how the mistake occurred and what precautions were taken prior to the filing of the erroneous entry, selection, or location, to avoid error in the description. The showing in this regard must be complete, because no amendment will be allowed unless it appears that proper precaution was taken to avoid error at the time of selection. The application will be closely scrutinized, and will not be allowed unless the utmost good faith is shown. 43 CFR 1821.6-3(a).

In seeking review of the decision of the State Office, appellant has stated that a man of ordinary prudence would not have discovered the discrepancy in the quarter corners and that the original entryman, Roundtree, acted in a prudent fashion and in good faith made an error in description. Appellant also claims that the error here lay in the surveyor's failure to monument the quarter corner in section 19. The record indicates that section 19 was included in a partial township survey after section 30 was surveyed. The partial township survey resulted in a south closing quarter corner for section 19 for which no monument was erected. However, the record also indicates that in 1912 it was not customary when closing original surveys (here for section 19) against a previously surveyed line, (here between sections 19 and 30), to monument quarter section corners on such previously surveyed line for those subdivisions of sections (i.e., lots 5 and 6) controlled by the closing corners. Therefore, appellant's claim of error in the surveyor's actions is without merit. Moreover, the record is devoid of any compelling evidence that the entryman did not intend to enter the lands patented to him. Even assuming, arguendo, that the entryman intended to enter the lands which appellant seeks, the record is barren of any evidence that "proper precaution was taken to avoid error at the time of selection."

In a similar case, Elizabeth B. Poncia, A-28982 (August 17, 1962), where an error in entry resulted from difficulty in identifying survey section corners, it was pointed out that:

* * * Before such amendments may be made, both the statute [43 U.S.C. § 697 (1970), supra] and the governing regulation require evidence that every reasonable precaution and exertion was made by the entryman to avoid error at the time of making the original entry. Harold K. Butson, A-26285 (December 29, 1951); 43 CFR 104.3 [43 CFR 1821.6-3(a) (1972), supra]. In the instant case, as

in the Butson case, there is no evidence that the entryman made any effort to avoid the error in the entry. At most, the evidence suggests that sometime between 1914 and 1920 Templeton [the original patentee] was aware of some uncertainty about the location of the land patented to him. This is insufficient to satisfy the regulatory requirement that it appear that proper precaution was taken to avoid error at the time of making the original entry. 43 CFR 104.3. Accordingly, the decision rejecting the application was proper. Id. at 2 (footnote omitted). 3/

In the present case, the evidence presented by appellant does not show what precautions Roundtree took prior to filing his entry to avoid error in the description. As was said recently in another case, " * * * [a]n applicant asserting a claim to receive the benefits of an Act of Congress has the burden of establishing his entitlement to such benefits. * * *" Tibor W. Fejer, 11 IBLA 166, 167 (1973).

The regulation sets forth the burden of proof which appellant must bear. There has been no showing made of "proper precaution * * * to avoid error at the time of selection." This burden of proof cannot be met by indulgence, sheer speculation, or conjecture, particularly in the light of the decades which passed without the parties involved seeking relief. See Elsie V. Farington, 9 IBLA 191 (1973), aff'd sub nom. Farington v. Morton, Civ. No. S-2768 (E.D. Cal., Dec. 5, 1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman, Member

I concur:

Joseph W. Goss, Member

I concur in the result:

Joan B. Thompson, Member

3/ Poncia noted that " * * * the requirement of evidence of proper precautions to avoid error at the time of the original entry may be almost impossible to satisfy when amendment is sought many, many years after the entry was made." Id. at 3, n. 1.

